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PROVIDING FOR REGULATORY REFORM IN ORDER TO ENCOURAGE INVESTMENT, BUSINESS, AND ECONOMIC DEVELOPMENT WITH RESPECT TO ACTIVITIES CONDUCTED ON INDIAN LANDS

SEPTEMBER 8, 1999.—Ordered to be printed

Mr. CAMPBELL, from the Committee on Indian Affairs,
submitted the following

REPORT

[To accompany S. 614]

The Committee on Indian Affairs, to which was referred the bill (S. 614) to provide for regulatory reform in order to encourage investment, business, and economic development with respect to activities conducted on Indian lands, having considered the same, reports favorably thereon with an amendment in the nature of a substitute, and recommends that the bill (as amended) do pass.

PURPOSE

The purposes of S. 614 are multiple: to provide for a comprehensive review of the laws, including regulations, that affect investment and business decisions concerning activities conducted on Indian lands; to determine the extent to which those laws unnecessarily or inappropriately impair investment and business development on Indian lands, or the financial stability and management efficiency of Indian tribal governments and to establish an Authority to conduct the review and to report its findings and recommendations to Congress.

BACKGROUND

By the 1980's, it was apparent that the Federal government's efforts in building healthy economies on Native lands were failing. With the exception of a handful of Indian tribes fortunate enough to be located near major metropolitan areas and which had developed gaming operations, most Native economies are still largely dependent on Federal transfer payments, an array of Federal hous-

ing, education, and health care services, and Federal employment opportunities.

After generations of vacillating and failed Federal Indian policies, in 1970, President Nixon initiated what has proven to be the most successful Federal Indian policy to date: Indian Self-Determination. The twin pillars of this policy are political self-government and economic self-sufficiency. In the intervening years, the evidence shows that true self-government flows from the ability of Native people to take control of and master their economic lives.

Experience has shown that Federal intervention alone, without corresponding private sector and tribal initiative, has failed to raise the standards of living of Native Americans. In fact, many Indian tribes have had positive and successful experiences with contracting and compacting for Federal programs and services pursuant to the Indian Self-Determination and Education Assistance Act of 1975,¹ with planning and managing their own employment training programs under the Indian Employment Training and Related Services Demonstration Act of 1992,² and with other programs designed to maximize tribal decision-making and provide an appropriate role for the Federal government.

For decades the Congress and the Federal government in general have sought to improve the standard of living of America's Native populations. These efforts include initiatives to finance and develop physical infrastructure, increase Native skills development and employment, assist Native communities in attracting and retaining capital and outside investment, and others.³

PURPOSE

Despite these efforts, Native Americans suffer the highest rates of poverty, unemployment, ill-health, and associated social pathologies in the nation. The 1990 Decennial Census shows that the national unemployment rate for Native people hovers around 50%, with jobless rates in some areas such as the Dakotas in the 80–90% range. The most recent national statistics show that 51% of reservation Indians live below the poverty line and that the per capita income for reservation Indians is \$4,478.⁴

Those tribes that are achieving economic success have found that for business and wealth creation to thrive, there must be certain pre-conditions. As is the case with U.S. and international efforts to build the economies of developing nations, efforts to build healthy Native economies involve a variety of factors including the development of physical infrastructure, housing, health care, education, skill development, access to capital, and a host of other capabilities. At the same time, the availability and effectiveness of Indian-re-

¹ 25 United States Code 450, et seq.

² 25 United States Code 3401, et. seq.

³ See for example, Hearing Before the U.S. Select Committee on Indian Affairs regarding Barriers to Participation in Federal Domestic Assistance Programs, September 8, 1977; Oversight Hearings Before the Committee on Interior and Insular Affairs on Indian Economic Development Programs, June and July 1979; Hearings Before the Committee on Indian Affairs regarding Economic Development on Indian Lands, September 17, 1996; Hearing Before the Committee on Indian Affairs regarding Indian Economic Development, April 2, 1998; and various Hearings Before the Committee on Indian Affairs regarding Economic Development, Regulatory Reform, and Related Matters, January–July, 1999.

⁴ See, We, The First Americans, U.S. Department of Commerce, Economic and Statistics Administration, Bureau of the Census, September, 1993.

lated Federal spending is and has been declining for the past 25 years.⁵ Exacerbating these spending trends, there remain substantial levels of unmet financial, technical and other needs in America's Native communities.

Some of the main obstacles to Native business and economic development are: lack of capital and capital institutions; poor physical infrastructure; a historical emphasis in Native communities on employment rather than profit; the adverse impact of tribal politics on tribally-owned and individually-owned businesses; and the lack of reservation-based business activities, leading to net outflow of those dollars that make their way into Native communities.

An additional and recurring emphasis is on "building business friendly environments" at the tribal and Federal levels to provide confidence to investors and entrepreneurs alike. Often referred to as providing "legal" or "governance" infrastructure, these activities include well-established and operating tribal justice and dispute resolution mechanisms, legal code development, and legal and regulatory regimes that foster economic growth and risk-taking.⁶

The quality of the environment offered by tribal governments to potential business operators has a direct and significant impact on the level and success of economic activities on Native lands. Similarly, and because of the unique Federal-tribal relationship, the quality and efficiency of the Federal bureaucracy plays a significant role in determining which activities occur on Native lands.

Indeed, one of the key studies of economic development in Indian country indicates that one of the main ingredients to tribal success in building solid economies and becoming more self-sufficient is not necessarily an abundance of natural resources.⁷

Rather, the three main factors determining whether or not a tribe will succeed are: (1) the degree of sovereignty⁸ exercised by the tribe; (2) whether the tribe has a "capable government"; and (3) whether there is a match between the type of government a tribe has and the tribe's cultural norms regarding legitimate political power.⁹

The last two factors are prevalent in efforts many tribes have launched regarding "good governance" and "best practices" in order to help develop and diversify their economies. These practices include constitutional revisions to address contemporary challenges, the establishment and use of commercial codes and rules of admin-

⁵See generally, Indian Related Spending Trends, FY 1975–1999, Congressional Research Service, Library of Congress, Washington, D.C. 1999.

⁶In February, 1998, the General Accounting Office (GAO) published Native American Housing: Home-ownership Opportunities on Trust Lands Are Limited, GAO/RCED-98-49, pointing out that "uncertainty" about tribal courts, court procedures, and Indian Trust land status hinders private mortgage lending in Native communities.

⁷See What Can Tribes Do? Joseph Kalt and Stephen Cornell, Harvard Project on American Indian Economic Development, 1992.

⁸"Sovereignty" as used in this work is said to be "de facto" sovereignty or genuine decision-making and control over tribal affairs and resources. The pattern discerned in the study is that sustained economic development is associated with tribal decision-making replacing that of the Bureau of Indian Affairs or other "outside" decision-making. The authors maintain that economic development is a consequence of the exercise of sovereignty, and stated that "(o)ne of the quickest ways to bring development to a halt and prolong the impoverished conditions on reservations would be to further undermine the sovereignty of Indian tribes." Testimony of Joseph Kalt, Director, Harvard Project on American Indian Economic Development, Before the Senate Committee on Indian Affairs, September, 1996, S. Hrng. 104-684, at 6.

⁹"Capable governments" are said to be those that efficiently make and carry out strategic choices regarding development; provide a political environment in which investors "feel secure"; and mobilize tribal institutional support for the development strategies chosen.

istrative procedure, and a separation of powers within the tribal government.¹⁰ At bottom, vibrant Native economies are those that are made possible by governments that can separate politics from business, and those with a mechanism to separate the exercise of governmental powers.

THE NEED FOR LEGISLATION

“Regulatory reform” as one proposed component in a larger strategy to revitalize Native economies is not a new phenomenon. Over the past 15 years there have been no fewer than six (6) major studies undertaken that include elements of regulatory reform in their focus.¹¹ There are, however, several factors that lend urgency to both regulatory reform and economic development efforts in Native communities.

First, is the 1996 Personal Responsibility and Work Opportunity Reconciliation Act, better known as “welfare reform” which is now being implemented in communities across the nation.¹² Though the Act will present tribal governments with opportunities and resources to address employment training, child care and other welfare-related matters, the focus of the welfare reform statute is on employment and employment opportunities. For communities with high unemployment rates and difficulties in generating value-added activities and job opportunities, such as rural and Native populations, the success of welfare reform hinges on revitalized rural economies.

Success in raising the standards of living of Native Americans depends on the ability of tribal governments, the Federal government and the private sector to build business-friendly environments in which business can thrive.

The goal of S. 614 is to maximize the participation of Indian tribes and the private sector in a newly-established “Regulatory Reform and Business Development on Indian Lands Authority” to undertake a comprehensive review of the legal and regulatory regime that governs activities on Indian lands and to recommend changes in that regime to help tribes build strong tribal governments and more vigorous economies.

SECTION-BY-SECTION ANALYSIS OF S. 614

Section 1. Short title

Section 1 sets forth the title of the bill as the Indian Tribal Regulatory Reform and Business Development Act of 1999.

¹⁰ Kalt and Cornell’s study indicates that “an independent judiciary” added 5 to 10 percentage points to the rate of job creation in Native communities. This key factor influences both the outside, non-Indian investment sector as well as the Indian entrepreneurial and business sectors, *Supra* note 6, at 15.

¹¹ The Presidential Commission on Indian Reservation Economies, Report and Recommendations (November, 1984); Department of Interior, Report of the Task Force on Indian Economic Development (July, 1986); The Report of the Special Committee on Investigations—Select Committee on Indian Affairs November, 1989; What Can Tribes Do? Strategies and institutions in American Indian Economic Development (1992); Sar Levitan and Elizabeth I. Miller, The Equivocal Prospects for Indian Reservations (May, 1993); The Report and Recommendations of the Joint Tribal/Bureau of Indian Affairs/Department of Interior Task Force on Reorganization (August, 1984).

¹² The Personal Responsibility and Work Opportunity Act of 1996, Pub. L. 104–193.

Section 2. Findings, purposes

Section 2 provides the Findings and the Purposes for the Act in which the Congress finds that though many Indian tribes have abundant natural resources, Native Americans suffer rates of unemployment, poverty, ill-health, substandard housing, and related social ills at rates greater than any other group in the United States. The growth and development of tribal economies is hindered by the tribes' inability to engage outside communities and entrepreneurs alike and encourage them to conduct business activities on tribal lands. Grounded in the government-to-government relationship, the United States has an obligation to assist Indian tribes in the creation of appropriate economic and political conditions to encourage outside investment and facilitate development on Indian lands.

The purposes of the legislation are to provide for a comprehensive review of the laws and regulations that affect investment and business decisions concerning activities on Indian lands; to determine the extent to which those laws unnecessarily or inappropriately impair investment and business development on Indian lands, or the financial stability and management of Indian tribal governments; and to establish an authority to conduct the comprehensive review and report the findings and recommendations resulting from the review to Congress and the President.

Section 3. Definitions

This section defines the terms "Authority", "Federal Agency", "Indian", "Indian Lands", "Indian Tribe", "Secretary", and "Tribal Organization".

Section 4. Establishment of authority

Section 4 establishes the "Regulatory Reform and Business Development on Indian Lands Authority" to conduct the comprehensive review of the legal and regulatory regime and to facilitate the identification and subsequent removal of obstacles to investment, business development, and the creation of wealth in Native economies. The Authority is to be composed of 21 members as follows: 12 representatives of Indian tribes, 4 representatives from the private sector, and the remaining 5 to be chosen by the Secretary of Commerce. A chairman is to be selected by the representatives of the Authority. Not later than 90 days after enactment, the Authority is to meet to hold its initial meeting.

Section 5. Report

Section 5 requires the Authority to prepare and submit to the Senate Committee on Indian Affairs, the House Committee on Resources, and to each Federally recognized Indian tribe a report containing its findings and any recommendations concerning the laws and regulations that are subject to review by the Authority.

Section 6. Powers of the authority

Section 6 outlines the activities that the Authority may conduct including holding hearings, taking testimony, and receiving evidence as it considers advisable. The Authority is authorized to se-

cure from any Federal department or agency information the Authority considers necessary to carry out the duties of the Authority.

Section 7. Authority personnel matters

Section 7 provides authority for the compensation of members of the Authority, allowable travel and per diem expenses, and the selection of Authority staff and temporary or intermittent services.

Section 8. Termination of the authority

Section 8 provides that the Authority is to terminate 90 days after the date on which it has submitted a copy of the report to the Congressional committees and the Indian tribes as required by section 5.

Section 9. Exemption from Federal Advisory Committee Act

Section 9 exempts the activities of the Authority from the Federal Advisory Committee Act (5 U.S.C. App.).

Section 10. Authorization of appropriations

Section 10 authorizes the appropriation of such sums as are necessary to carry out the Act, with such funds to remain available until expended.

LEGISLATIVE HISTORY

The Indian Tribal Regulatory Reform and Business Development Act (S. 614) was introduced on March 15, 1999, by Senator Campbell, for himself and for Senator Inouye, and referred to the Committee on Indian Affairs. On June 16, 1999, Senator Orrin G. Hatch was added as an original co-sponsor.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

The Committee on Indian Affairs, in an open business session on June 16, 1999, by voice vote, ordered an amendment in the nature of a substitute to the bill reported to the Senate, with the recommendation that the Senate pass the substitute amendment.

COST AND BUDGETARY CONSIDERATIONS

The cost estimate for S. 614, as amended, as calculated by the Congressional Budget Office, is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 24, 1999.

Hon. BEN NIGHTHORSE CAMPBELL,
Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 614, the Indian Tribal Regulatory Reform and Business Development Act of 1999.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Megan Carroll.

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippen, Director).

Enclosure.

S. 614—Indian Tribal Regulatory Reform and Business Development Act of 1999

CBO estimates that implementing S. 614 would have no significant impact on federal spending. Because enacting the bill could affect direct spending and governmental receipts, pay-as-you-go procedures would apply, but CBO estimates that any such effects would be insignificant. S. 614 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

S. 614 would direct the Secretary of Commerce to establish a Regulatory Reform and Business Development on Indian Lands Authority to review all laws and regulations that affect economic development in Native American communities. The bill would require this new authority to prepare a report on its findings and recommendations within one year of enactment. S. 614 would authorize appropriation of the amounts necessary to implement the bill and would allow the authority to accept and use gifts or donations of services or property. Based on information from the Department of Commerce, CBO estimates that the total cost of implementing S. 614 would be less than \$500,000 and that the total value of any gifts or donations accepted and used by the authority would be negligible.

The CBO staff contact is Megan Carroll. This estimate was approved by Paul N. Van de Water, Assistant Director for Budget Analysis.

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires that each report accompanying a bill to evaluate the regulatory paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 614 will have de minimis regulatory or paperwork impact in the short-term and that the long-term regulatory or paperwork impact of S. 614 will be beneficial.

EXECUTIVE COMMUNICATIONS

The Committee has received no official communication from the Administration on the provisions of the bill.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill are required to be set out in the accompanying Committee report. The Committee finds that enactment of S. 401 will not result in any changes in existing law.

